United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-7410

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United States Court of Appeals

FOR THE SECOND CIRCUIT

AMERICAN GREETINGS CORPORATION,

Plaintiff-Appellant,

v.

WESTRANSCO FREIGHT COMPANY, INC.,

Defendant and Third-Party Plaintiff-Appellee,

v.

ASSOCIATED FREIGHT LINES, INC.,

Third-Party Defendant-Appellee.

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

BRIEF FOR THE THIRD-PARTY DEFENDANT-APPELLEE

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Appellees. :

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BRIEF FOR THE THIRD PARTY DEFENDANT APPELLEE

Issues Presented for Review.

The plaintiff appellant appeals from the decision of the Honorable Charles M. Metzner which granted appellees' motion for summary judgment dismissing the complaint of the plaintiff appellant on the ground that plaintiff appellant failed to file a written notice of claim within the nine-month period required by Section 2(b) of the Uniform Bill of Lading.

The issue presented for review is:

Was the Court below correct in holding that a written notice of claim by the plaintiff appellant, within nine-months from the date the shipment was delivered or should have been delivered, was a condition precedent to recovery against the defendant appellee?

Statement of the Case.

The third-party defendant appellee (Associated) was the "delivering carrier" of a shipment of greeting cards shipped by the plaintiff appellant to various Air Force Bases in California. Associated's truck was not able to deliver the shipment because it collided with the San Francisco - Oakland Bay Bridge [R.A. p. 46]. No salvage was effected [R.A. p. 75].

Suit was commenced against the initiating carrier, a freight forwarder, third-party plaintiff appellee Westransco.

First written notice of claim to Westransco was by "Standard Form for Presentation of Loss and Damage Claim" dated May 30, 1975 [R.A. p. 25]. Nine-months from the date of shipment, i.e., March 14, 1974, would have been December 14, 1974 [R.A. p. 25]. Westransco notified the Air Force Bases by letter with carbon copies to the plaintiff (American) appellant dated April 19, 1974 that the subject shipment was involved in an accident. American contends they did not receive copies of these five notices [R.A. p. 59].

Subsequently appellees moved for summary judgment dismissing American's complaint on the ground that written notice of claim was not served by American

within nine-months of the date the goods arrived or should have arrived. The Court below granted appellees' motion.

POINT I

TIMELY WRITTEN NOTICE OF CLAIM IS NECESSARY UNDER SECTION 2(b) OF THE UNIFORM BILL OF LADING IN ORDER THAT:

I) THE CARRIER MAY INVESTIGATE THE LOSS; AND
II) DISCRIMINATION BY THE CARRIER MAY BE AVOIDED; AND
III) THE CARRIER MAY MAINTAIN BOOKEEPING APPROPRIATE TO THE CLAIMS IT KNOWS HAS BEEN FILED AGAINST IT.

Section 2(b) of the Uniform Bill of Lading states in applicable part:

> "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed..."

The necessity to common carrriers of these written claims has been explained by one authority as follows:

> "If carriers adopted a liberal attitude in this regard, the provisions with respect to claim filing would soon become meaningless, discrimination and preferences would result, estimate of outstanding liability on claims would be

> impossible, opportunity for prompt investigation would be lost, and dilatory claim filing greatly encouraged. Further, motor carriers under the BMC-32 endorsement to their cargo insurance policies would undoubtedly be compelled to pay much higher premiums."

Miller's Law of Freight Loss and Damage Claims, Richard R. Sigmon, Third Edition 1967.

Thus, when it comes time to construe the language of Section 2(b) of the Uniform Bill of Lading in the "practical way" required by the Courts (infra), these necessities to common carriers should be borne in mind.

Preliminarily, it should be noted that Section 2(b) requires "...a claim filed in writing... within nine months... after a reasonable time for delivery has elapsed." It is uncontested that nothing denominated as a "claim", was filed within the necessary time with any carrier involved in the subject shipment.

The Federal Courts have held that such a failure to file a written timely notice of claim bars recovery against the carrier. This is true, whether or not the carrier has actual knowledge of the loss. Nor can a carrier be estopped from asserting the provisions of Section 2(b).

> "A review of the federal decisions clearly shows that a written notice, however informal, must be filed with the defendant railroad. The railroad is not estopped or does not waive this requriement in the following circumstances: Where the railroad actively negotiated with the plaintiff for a settlement of the claim; where an oral claim was made for damages; where the railroad had conducted an investigation; and where the railroad had actual knowledge that damage had occurred. (citations omitted)"

Lucas Machine Division, etc. v. New York Cent. R. Co. 236 F. Supp. 281 (N.D. Ohio, 1964).

The Court went on to state at p. 283:

> "The requirement of filing a written claim is an easy one, and one of which the plaintiff was well aware. The filing of the claim not only enables the railroad to conduct a full and complete investigation, it also is the orderly and uniform way to inform the railroad that one has a claim against the railroad and that compensation is expected. A written claim further prevents discrimination and misunderstanding which can result from oral arrangements."

There is a general theme that runs through plaintiff appellant's argument which insists that if the damage was caused by the defendant carrier and the carrier knew it and so informs the shipper/consignee, then there is no need for any written notice of claim. (e.g., Appellant's brief p. 1 and subsequent reliance on Hopper Paper Co. v. Baltimore and Ohio R.R. Co. 178 F.2d 179 (7th Cir., 1949).

The Courts have held otherwise. The following decisions all after the Hopper case, confirm the necessity of a timely written notice of claim. These decisions also distinguish the Hopper case.

> "A study of the federal decisions, including those of the Supreme Court, makes it clear that some sort of written notice of claim is essential. It is not enough that the carrier had actual knowledge that damage had occurred, or that an oral claim for damages was made."

Northern Pac. Ry. Co. v. Mackie 195 F2 641 [p. 642] [9th Cir., 1952].

The Court went on to mention the Hopper case, relied upon by the plaintiff:

> "Whether, in light of the unusual circumstances of that case, the holding is reconcilable with the federal rule we need not stop to inquire." [at p. 643]

The Court then concluded:

> "A vital purpose of the Interstate Commerce Act is to prevent preferences and discrimination by carriers as among shippers. For the carrier to disregard the condition precedent to recovery incorporated in the bill of lading here would, under the circumstances shown, open the door to evasions of the spirit and purpose of the Act in the respects mentioned. [citations omitted]" [at p. 643]

In East Texas Motor Freight Lines v. United States 239 F2d 417 (5th Cir., 1956), it was again held that actual knowledge of the loss would not dispense with the requirement of notice of claim. The Court went on to hold the Hopper case inapplicable.

See also Atlantic Coast Line Railroad Co. v. Pioneer Products 256 F. 2d 431 (5th Cir., 1958)

Further, mere knowledge of the loss by the carrier would not permit an adequate investigation by the carrier. A claim is necessary.

> "While the purpose of the notice [of claim] is to give the carrier an opportunity to investigate the claim..., the identity of the claimant is a material feature of any such investigation."

Delphi Frosted Foods Corp. v. Illinois Cent. R. Co. 188 F2d 343 (p. 345) [Sixth Cir., 1951]

These decisions are consistent with the wording of Section 2(b) which require a "written claim". Section 2(b) does not require a "written claim or knowledge of the carrier..."

While the Courts have required construction of Section 2(b) in "a practical way", it would do violence to the Section to interpret it in a

manner so as to drive it out of existance. Clearly, the Section requires something to be done, in writing within nine-months, which informs the carrier he is being claimed against and that, therefore, compensation is expected.

> "The written notice which is to be considered in a 'practical way' is sufficient if a carrier cannot draw any inference from it other than that a claim for damages was contemplated, even if the writing does not contain a formal demand for damages. (citations omitted)"

Delaware, L. & W. R. Co. v. United States 123 F. Supp. 579 at p. 582, [S.D.N.Y. 1954].

The Court in Delaware etc., went on to mention Hopper Paper (supra) stating that it "has been seriously questioned in later cases." (p. 583)

See also: Penn State Laundry Co. v. The Pennsylvania Railroad Co. 134 F. Supp 955 (U.S.D.C. W.D. Pennsylvania 1955)

POINT II

THE HOPPER CASE RELIED UPON BY THE APPELLANT IS A MAVERICK CASE, AND SHOULD NOT BE FOLLOWED.

It will not be argued that the Hopper case does not exist or that it has been overruled. But

it is interesting, however, to note how a later Court in the same curcuit (7th) interprets a fact situation virtually identical with that of the case at bar, in the light of Hopper.

> "We do not believe that Hopper Paper Co. v. Baltimore & Ohio R. Co., 178 F.2d 179 (7th Cir. 1949) should be extended beyond its own particular facts which differ from those in the case at bar. In the Hopper case, the goods were destroyed by a collision of two of the defendant's trains. After the nine-months' period had run, the consignor filed a claim. The court held that it was not barred inasmuch as the carrier had full possession of all the facts, expected that a claim was forthcoming, and had itself notified the consignor in writing. Nothing further would be accomplished by a written claim from the consignor. In the case at bar, however, the consignor's claim was against the initiating carrier which had promptly delivered the goods to the railroad and therefore had no further connection with them or with their loss or destruction. A notice to the defendant therefore would have permitted it to perfect its right against the railroad, but until such a notice was served upon the defendant, it had no basis for filing its own claim.
>
> We might add that there could be many reasons why claims are never filed, other than mere negligence or oversight. They might be covered by other insurance, the consignor might prefer to take a tax deduction, or the consignor might be a subsidiary or otherwise have a financial interest in the carrier. Therefore, in order for a carrier

> and its accountants to know what contingent or other liabilities exist at any given time, it should be able to rely upon applicable statutes of limitations. As a matter of common equity between contracting parties, the widely criticized Hopper decision should not be extended."
> [emphasis supplied]

Henry Pratt v. Stor Dor Freight Systems, Inc., 416 F. Supp. 714 [N.D. Ill., 1975]

This decision is particularly instructive since it paints out how Hopper can be distinguished from the case at bar.

The similarity of the facts of the Henry Pratt case to the case at bar illustrate how different and, therefore, inapplicable the Hopper case is.

The present case involves an initiating carrier (a non-vehicle owning freight forwarder), Westransco, which informed the plaintiff that there was an accident in San Francisco involving the plaintiff's shipment [R.A. p. 54]. This accident turned out to be the Associated Freight Lines' collision with the Oakland-Bay Bridge.

As mentioned above, Associated Freight Lines was the last of the series of carriers involved with this shipment, it having been carried by rail and

truck previously from Arkansas. As the carrier in whose custody the goods were damaged, written notice of claim becomes crucial to Associated so that it may conduct its investigation with regard to:

A) The nature of the shipment and its value;

B) the owner of the shipment;

C) the condition of the shipment while in the possession of the previous carrier for the purpose of possible claim over against these carriers.

Written notice of claim, therefore, becomes for appellee Associated Freight Lines, not a mere technicality with which "to shield itself from liability" [appellant's brief p. 1] but an essential investigative tool.

The difficulties of a delivering carrier, far removed down the line from the initiating carrier, are clearly recognized in the Henry Pratt case.

Since cases subsequent to Hopper have refused to extend Hopper beyond its facts, this Court is also urged not to adopt the Hopper ruling, but instead affirm the ruling of the Court below which correctly held that timely written notice of claim is a condition precedent to recovery by the appellant.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED AND THE APPEAL DISMISSED, WITH COST.

Respectfully submitted,

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Due and timely service of TWO copies
of the within BRIEF is hereby
admitted this 12TH day of NOVEMBER 1976

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